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THE THEORY OF THE SOCIAL CONTRACT AND THE LEGITIMIZATION OF CRIMINAL LAW

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Abstract:

The paper is devoted to one of the most fundamental problems of criminal law – its legitimation. Researchers do not pay enough attention to this problem, which leads to the unsystematic use of criminal law tools and reduces the efficiency of the whole branch of law. The object of this work is the views of various philosophical, sociological and legal schools on the substantiation of state violence; the sources of pre-revolutionary, Soviet criminal law; active Russian and foreign legislation; pre-revolutionary and modern works on the theory of criminal law. The goal of the author is to work out a holistic and consistent approach to this problem. He summarizes and systematizes research ideas that are analyzed with the help of philosophical theories and active Russian and foreign legislation. The author concludes that the most prospective direction of legitimation of criminal law is the substantiation of state violence on the basis of the theory of social contract. Its advantage is that it is based on the balance between the sovereignty of the person and the interests of safety. The author believes that the natural consequence of this theory is the conceptualization of criminal law as an extreme measure of counteracting infringements. The author examines some general aspects of the introduction to criminal law from the standpoint of social contract. He also substantiates the existence of criminal law relations before socially dangerous acts are committed and argues that the all members of a society are participating in these criminal law relations. The main task of criminal law is the protection of social relations. The obtained results can be used in law enforcement, in teaching criminal law disciplines and in the further research of the problems of introduction to the criminal law.

Keywords: Termin «criminal law»; essence of criminal law; legitimation of criminal law; object, tasks, functions of criminal law

Improving the effectiveness of criminal law involves developing clear positions on the fundamental problems of the industry. Insufficient attention to these issues leads to the unsystematic application of criminal law instruments. This is especially important at the present time, when there is a crisis of criminal law, an increase in crime, the redundancy of criminal repression and its low effectiveness [1; 2]. The name "criminal law" combines both the idea of crime and the idea of punishment. This term reflects the role of the State as a subject of protection of vital human interests. It is located "at the head" and is the only organization capable of punishing a criminal.

The main feature of criminal law is its repressiveness. No other industry involves the use of acts of violence against a citizen, similar to the death penalty or imprisonment. For criminal law, punishment, along with crime, is a central category. In foreign countries, the relevant branch is called the law on crimes (criminalrecht (German), criminallaw (English), droitcriminal (French) from Latin crimen — crime) or the law on punishments (strafrecht, penallaw, droitpenal from Latin. poena — punishment). Black's legal dictionary even indicates the interchangeability of these terms [3, p. 431]. We can say more: if we assume that the protection of social values, the restoration of justice, and the prevention of socially dangerous acts are possible without the institution of punishment, the existence of criminal law is hardly justified in principle. So, in terms of regulation and protection of public relations, this industry has the property of subsidiarity (complementarity). Most often, it contributes to the normal functioning of relations regulated by other industries. Criminal law relations arise only as derivatives. The latter are necessary in extreme, extraordinary cases. At the same time, criminal law ensures the normal functioning of public relations either through the threat of punishment (in general representative relations) or through its application (in protective public relations).

Criminal punishment is legalized violence against a person by the State, and the Criminal Code is a system

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of norms that determine in which cases the state has the right to use violence against citizens. In this regard, criminal law is a sewer of "state violence.

In this regard, the question arises of the legitimization (justification) of criminal law. The essence of this question is whether the State has the right to use violence against a citizen who has committed a socially dangerous act, and if so, on what basis.

Historically existing approaches to solving this issue can be divided into two groups: denying and justifying the existence of this right by the State. The first approach is based on the following judgments:

1) denial of free will, and therefore the ability to punish misconduct; 2) denial of the existing punishment system due to its inefficiency; 3) denial of the right to punish misconduct, since it is a consequence of the imperfection of society, which is led by the state; 4) punishment is violence, and therefore evil, with which it is impossible to fight another evil is a crime [4, p. 38].

It is easy to see that one of these arguments is directed not against criminal punishment as such, but against its ineffectiveness, which takes the discussion to another plane. The other three arguments relate not just to the State's right to punishment, but punishment in principle. We see the justification for this either in the fact that the cause of the crime is seen not in the subject itself, but outside of it, or in the impossibility of eradicating violence by violence. These arguments cannot be supported. Recent studies show that the subject is free to express his will to the extent that is sufficient to bring him to personal responsibility [5]. Otherwise, we are inevitably forced to justify the impunity of crime.

Moreover, even supporters of the theory of determinism, who deny free will, for the most part recognize the need for punishment. They justify it, for example, by the fatal need to protect society (in other words, laws are designed to prevent people from harming each other) or the ability of criminal law to join the general chain of events and change the will of a person [6, pp. 240-241]. As for the fundamental characterization of criminal punishment as evil, it is far from indisputable. For example, sometimes it is considered as the restoration of social justice, which fully corresponds to public ideas about the eradication of evil [7].

It should be noted that statements about the state's lack of the right to punishment are relatively rare in science. L.S. Belogrits-Kotlyarevsky noted that these theories are so few and their scientific credit is so weak that French and German textbooks of criminal law do not even mention them. To refute these theories, he cites the example of Robert Owen. The latter, being an opponent of all kinds of punishments, organized a factory in Scotland-a community where workers were participants in income, the main principles of the hostel were recognized as suggestion and explanation. However, despite all efforts, the community could not refuse to apply censures and punishments to its comrades [8, pp. 37-38].

Most researchers, including foreign ones, recognize the need for criminal law. It is noted, in particular, that it is an indispensable attribute of the state, generated by the needs of modern life [9].

The theories justifying the right of the State to use violence against persons who have committed socially dangerous acts are diverse. Some of them proceed from the fact that punishment is a manifestation of human nature itself, including the instinct of revenge inherent in it. Others find an explanation in social assumptions.

Special attention should be paid to the theory of the social contract, or social contract. She explains the origin of law as the result of a contract between members of society. People agree to limit their freedoms and sovereignty in exchange for protection from the possible arbitrariness of individuals on the part of the state.

The concept of the essence of the state as a result of an agreement between people has been present in social and political philosophy since ancient times. According to this theory, people, being in a "natural state", by free agreement create an institution that, by force of law, ensures their natural rights, given to them from birth and marks the beginning of their proper civil life. The concept of the social contract received its full development from the thinkers of Modern times — T. Hobbes, S. Pufendorf, O. Sidney, J. Locke, J.-J. Rousseau. At the same time, various theorists of the social contract interpreted the natural state, the amount of alienated rights, and popular sovereignty in different ways. Hobbes's natural state is characterized by a "war of all against all." People are forced to conclude a social contract by fear for their lives. The State is endowed with unlimited power. Locke creates a more liberal concept. By uniting into a state, people transfer to it only a small part of their rights, while maintaining sovereignty and being the only source of power. The idea of a social contract was an alternative to the ideas common in feudal society about the divine origin of power. It had far—reaching consequences — up to the justification of the overthrow of absolute monarchies in England and France, and in North America - the establishment of a constitutional republican system [10, p. 681].

The social relations related to punishment undoubtedly relate to the relations of power. The latter are always associated with the predominance of one will over

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another. According to the rules of dichotomy, these relations can be divided into two types. The first involves violence occurring without the consent of the object (what Hegel called the usurpation of free will). Moreover, this is an action for which, in principle, the consent of those against whom it is directed cannot be obtained, because it does not take into account their goals, rights, interests [11, p. 14].

The second type of power relations is associated with violence, to which the consent of the object has been obtained. In this case, consent can be obtained directly, it can be implied, or it could be obtained if the legal capacity of the object exists. In particular, this includes paternalistic relationships — the predominance of an adult, parental will over an unformed, childish will.

It seems that the criminal legal impact should be attributed to the second type of relationship. Of course, the vast majority of criminals are not ready to follow Socrates' example and voluntarily "drink the cup of hemlock" when there is an opportunity to avoid it. Nevertheless, it must be recognized that the State carries out criminal repression with the consent of society, including with the prior consent of the offender, and takes into account the interests of the latter. Of course, this is an ideal model that corresponds to the principles of humanism and justice of criminal law. In practice, there are distortions and deviations from it. But now we are not aiming to explore this. Thus, we consider the consent of the objects of coercion to be an essential sign of criminal law coercion. This is the only way to justify the existence of State violence.

This thesis perfectly corresponds to the theory of the social contract. According to her, the legitimization of criminal law looks like this: it exists by virtue of an agreement between members of society, under the terms of which people allow the use of violence by the state against them in exchange for protection from committing socially dangerous acts by individuals.

It seems that this approach, with proper scientific development, is able to solve the main practical task of legitimizing criminal law: to become a criterion for evaluating the criminal law prohibition.

As A.E. Zhalinsky pointed out, criminal law science does not have information about the real danger of a particular type of behavior and the individual acts that form it. The experience of declaring speculation, homosexuality, private entrepreneurship, etc. crimes illustrates the danger of this gap [12]. There is an urgent issue of developing criteria for criminalization and decriminalization of acts, a comprehensive assessment of the criminal law prohibition.

The theory of the social contract raises many objections, but they are all refutable.

A contract is by definition a voluntary act. But can an individual or a collective renounce a social contract and declare that he does not need protection from the state, and the criminal law does not apply to him? Obviously, this is not possible.

1. The Agreement assumes the possibility of monitoring its compliance on both sides. However, practice shows that this rule does not work in the case of criminal law. A citizen, having transferred part of his sovereignty to the state, does not actually have mechanisms to control the execution of his part of the "treaty" by the state. For example, deliberately false information is spread about a citizen, discrediting his honor and dignity (Article 128.1 of the Criminal Code of the Russian Federation "Slander"). Having exercised his right to private prosecution, the victim applies to the court with a demand to bring the perpetrator to criminal responsibility. However, due to an error or bribery, the judge acquits the accused. There is an improper fulfillment of the social contract. However, the State (not the judge, but the State as a party to the social contract) probably will not bear any responsibility.

2. The population does not actually take part in solving the most important issues of criminal law, for example, in the processes of criminalization, decriminalization of acts. The State, within the framework of its policy, decides for itself which acts to declare criminal, which measures to apply to the perpetrators, etc. This situation does not correspond to generally accepted ideas about contractual relations.

3. The idea of a social contract does not quite correspond to the system of sanctions for crimes and the procedure for bringing the perpetrator to justice. So, if the State solves the problem of protecting the individual, it is unclear why the rule on reconciliation with the victim does not apply to all types of crimes involving the presence of a victim. The same can be said about cases of public and private-public prosecution. Their existence is hardly justified in the social contract model.

As for the first objection, it is still possible to achieve the effect of "liberation" from the patronage of the state. To do this, a person can leave the territory of the relevant jurisdiction and settle in a place where the laws of none of the states apply. Such a territory is the ocean outside the exclusive economic zones. There is no jurisdiction of any State here. Some researchers and non-profit organizations suggest using this circumstance.

The theory of the social contract differs favorably in that it proceeds from the balance of personal sovereignty and security interests. A social contract is often not considered as a real contract. This is a hypothetical agreement, a kind of ideal construction (this issue has

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been studied in detail by American philosophers R. Nozick, D. Rawls). A particular person may not give his explicit consent to the criminalization of an act. It is only necessary to take into account his interest. The sum of the interests of the members of the society provides a justification for the criminal law prohibition. This is how the state receives discretionary powers within the framework of a social contract.

This approach removes the problem of proving the "technical" possibility of a social contract.

The question arises about the mechanism for identifying the interests of members of the society. It can be formulated as follows: how can the interests of members of society be taken into account in criminal law if the real aspirations of each citizen cannot be known for certain?

In 1785, Kant outlined his famous categorical imperative: "Act only according to such a maxim, guided by which at the same time you can wish it to become a universal law, as if the maxim of your action according to your will should become a universal law of nature." This rule requires a rational approach to behavior. It is in reasonableness that the source of just laws and just actions is found [13].

It will be useful to evaluate some categories and institutions of criminal law from this point of view. It seems that this will make it possible to clarify certain controversial issues of introduction to criminal law.

The independence of the branch of law is determined primarily by the subject — the range of public relations regulated by it. The issue of the subject of criminal law is debatable. So, there is an opinion that the subject of criminal law does not exist. This is justified by the fact that criminal law norms are not aimed at regulating public relations, but only at protecting them. Therefore, since the industry does not regulate anything, then the subject of the industry is absent by definition [14, p. 12; 15; 16, p. 4-5].

However, this view is criticized [17, p. 108; 18, p. 96; 19, p. 16; 20, p. 25]. Most criminologists agree that the subject of criminal law exists and define it as a circle of public relations [21, p. 11; 22, p. 8; 23, p. 4; 24, p. 4-5; 25, p. 7; 26, p. 12; 27, p. 9-11].

Some researchers do not associate the subject of criminal law with public relations. They define him, for example, as a person [28]; objects of criminal law protection specified in Part 1 of Article 2 of the Criminal Code of the Russian Federation [29, p. 7]; crime and punishment [30, p. 3].

The idea of the subject of criminal law as a social relationship corresponds to the general teaching of the theory of law. The subject of the legal branch is always public relations that are subject to protection, regulation, modification under the influence of legal norms. As V.D. Filimonov pointed out, the opposition of the object of criminal law protection and the object of crime is theoretically unjustified and can cause harm: lead to the undermining of the most important principle of criminal law - the recognition of the corpus delicti as the only basis for criminal liability [31].

The most debatable question is whether the subject of criminal law includes the relations that arise between citizens and the state in connection with the introduction of a criminal law ban, i.e. protective relations to keep people from committing a crime. In another way, this question can be formulated as follows: do criminal law relations exist before committing a socially dangerous act.

The concept of legitimation of criminal law outlined above allows us to answer this question positively. Since the criminal legal impact is carried out with the consent of the members of the society (and, of course, with prior consent), then it becomes obvious that there is a criminal legal relationship regardless of the commission of crimes. The content of this relationship is the mutual rights and obligations of society and the state: the first voluntarily restricts its own freedom, approves of repression and gets the right to demand its own security, the second undertakes to ensure security and gets the right to repression. As a result, a regime is being created to provide socially significant values with criminal legal means.

It is also interesting to analyze the question of the composition of the subjects of this relationship. There is a point of view according to which criminal law relations cover only a part of society. According to A.V. Naumov, society is divided into the following categories: people who do not commit crimes due to their upbringing (regardless of the presence or absence of criminal law); people who commit crimes, despite the threat of criminal liability; citizens who are deterred from committing a socially dangerous act only by the threat of punishment. For the first two categories, criminal law is indifferent. It affects only the citizens of the third group. They are the subjects of protective criminal law relations [26, p. 12].

This statement may be criticized. Firstly, the third category of citizens is identified solely on the basis of sociological surveys. There is probably no other way to determine the motives of a person who refrains from committing a crime. However, modern research shows that a person's opinion about the reasons for their actions is far from always trustworthy [32]. Human activity is complexly conditioned. It is very difficult to understand the reasons for people's actions, including for the person himself. In this regard, he, speaking

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about his behavior, gives the simplest and most obvious explanation.

Secondly, to conclude that most people refrain from committing crimes due to upbringing, confidence in the absolute conformity of the law with public ideas of justice is necessary, and this is not at all obvious.

The concept of legitimization of criminal law through the theory of social contract allows us to conclude that the subjects of criminal law relations are all members of society. Let's imagine a public highway. One of the motorists discovers a defect in the road surface that poses a threat to traffic safety. He applies to the court with a claim against the administration for the obligation to bring the roadway into proper condition. The court satisfies the claim. The administration is obliged to carry out repair work. In this case, is there a public relationship between the administration and motorists who were not involved in the case? I think so. At least because the administration is obliged to take into account the interests of the latter, and they, in turn, have the right to make similar demands.

Perhaps this is a crude analogy, but it is very clear. It shows that the subjects of relations with the State are all persons with whom it has mutual rights and obligations.

A person from the first group, identified by A.V. Naumov, may not experience criminal legal impact, since he does not commit crimes according to his beliefs. However, he has criminal law relations with the State. The state is obliged to take into account his interests (taking into account his interests is part of the legitimization of criminal law repression), it ensures his safety, it receives the right to carry out repression against this citizen in cases established by law. A person receives the right to demand security, gives consent to the implementation of criminal legal influence. Let's move on to the analysis of the tasks of criminal law. Their correct definition helps to increase the efficiency of the industry, as it orients the legislator and law enforcement agencies to act in a single direction determined by these tasks.

The tasks of criminal law were formulated in different ways in criminal laws. According to the Criminal Code of the RSFSR of 1960, this is only a protective (protective) task. The fundamentals of the criminal legislation of the USSR and the Republics of 1991 called three tasks: protective, preventive and educational.

A significant part of the authors of educational publications on criminal law formulate the tasks of criminal law in a similar way [33, p. 5; 34, p. 10; 35, p. 26; 36].

S.I. Nikulin deduces two tasks from Article 2 of the Criminal Code of the Russian Federation: protection from criminal encroachments of the interests of the individual, society and the state and the prevention of crimes. At the same time, the first of these tasks is the main one: criminal law acts as a security branch of law, without interfering in the regulation of public relations, it protects them from the most dangerous encroachments [37, p. 7].

A.I. Chuchaev speaks about three tasks: protective, preventive and educational. The latter is implemented in the application of criminal law norms. The commission of a crime causes a negative moral and political assessment on the part of not only the state, but also members of society [38, pp. 12-15]. His position is reproduced by V.T. Gaikov [39, p. 22].

A.V. Naumov speaks about the protective task of criminal law as the main one, not only for Russian law, but also for the law of other countries, for example, the United States. At the same time, he also admits the existence of other tasks, including educational ones [26, pp. 23-28].

Some authors also identify other tasks, including regulatory and restorative ones [40].

Often, the tasks of criminal law are identified with its functions. Thus, Yu.I. Lyapunov considers it possible to consider tasks and functions as overlapping concepts, since the main meaning of a function is to ensure the implementation of tasks as fully as possible [34, p. 10]. A.I. Chuchaev speaks of tasks and functions of criminal law as synonyms [33, p. 12-15]. The identification of tasks and functions seems to be incorrect. A task is defined as a situation that includes a goal and the conditions in which it must be achieved, and a function is defined as the role that various structures and processes play in maintaining the integrity and stability of those systems of which they are parts.

Thus, the function represents the outward manifestation of the internal properties of the object. In the case of criminal law, this is an impact on the consciousness and will of people, aimed at deterring them from committing crimes.

The theory of the social contract justifies the allocation of protection of public relations from criminal encroachments as a task of criminal law.

A distinctive feature of humans as a biological species is that humans are able to unite into giant communities that function very efficiently [41]. This is made possible by the existence of social institutions around which social relations arise (property, church, companies, trademarks, etc.). The participants of the latter do not know each other, but have relations with some common realities (for example, property), and this makes them a society.

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A socially dangerous act is always aimed at destroying society. It has the effect of severing public relations, disconnecting social groups, and reducing the status of public relations in favor of interpersonal ones.

The social contract is aimed at overcoming these negative phenomena. Within the framework of the social contract, the task of the state is to protect the social ties described above. One of the tools for this is criminal law.

Thus, fulfilling its obligations under the social contract, the State protects public relations through criminal legal influence.

This is the security feature of criminal law. The fact is that this industry is not capable of developing, modernizing, and improving public relations. This is the prerogative of special regulation. But criminal law can create conditions for such development, ensuring the security and inviolability of these relations.

As for other tasks, the fairness of their declaration is subject to reasonable criticism. So, regulation (from Latin regulare - to put in order, to establish) is always a purposeful change in public relations. Criminal law does not change them, but only protects them. If it is recognized as a regulatory task, this will lead to the blurring of the lines between criminal law and its other branches (civil, environmental, labor, etc.).

It is hardly justified to single out crime prevention as an independent task, since in its essence it coincides or is part of a protective task.

Education can also hardly be recognized as a task of criminal law. First, the task by definition must have boundaries and be measurable. For example, if crimes are not committed, then the protective task has been solved, if they are committed, then only partially solved, and the degree of its resolution can be quantified. In the case of parenting, this is not possible. Secondly, the educational task is most effectively solved during the meaning and execution of punishment. However, the need for punishment arises only if the task of protection is not solved. Thus, the less effectively the task of protection is solved, the more effectively the task of education is solved. Such a system of tasks within one branch of law can hardly be considered normal [40].

Within the framework of a journal article, it is impossible to analyze all the main institutions of criminal law from the position of a social contract, but the conclusion is obvious: this theory allows not only to substantiate the existence of criminal law, but also to clarify many controversial issues in this industry.

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